UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * *

GARY PETITTI, Appellant,	)	
vs.	)	No. 22345
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANT'S OPENING BRIEF

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I N D E X

LIST OF AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Nevada denying Appellant's motion under Title 28, United States Code, Section 2255 to vacate the judgment of commitment.

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

STATEMENT OF PLEADINGS AND FACTS

The Appellant, on May 16, 1967, filed a petition to vacate sentence brought under the provisions of Title 28, United States Code, Section 2255 [TRI, 2-3][1].

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1. TRI refers to transcript of record, Volume I.

The Appellee filed response to the petition on May 16, 1967 [TR I, 4-5]. Thereafter, on June 30, 1967, a hearing was held before the Honorable Roger D. Foley, District Judge, at which hearing the Appellant was personally present and testified [TR I, 9]. The trial court, on July 7, 1967, entered Findings of Fact and Conclusions of Law and a Judgment denying the petition [TR I, 11-20]. Notice of Appeal was filed on August 31, 1967 from the judgment of the Court. [TR I, 21].

STATEMENT OF THE CASE

The Appellant appeared before the Honorable Roger D. Foley, District Judge, on June 13, 1966 for arraignment on an Information charging him with violating Title 26, United States Code, Section 4704(a). The Appellant, at this arraignment, entered a plea of guilty to the offenses charged.

The Court, prior to accepting Appellant's plea, ascertained that the Appellant was entering the plea because he had committed the offenses and had the Appellant relate how he committed the offenses. The court, prior to accepting his plea, informed the Appellant of the penalty provision for the offenses, inquired if anyone had threatened, made promises or coerced the Appellant and that his plea was solely and voluntarily given. The Court further informed the Appel-

lant that the sentence to be imposed was entirely up to the Court [TR I, 12-15].

The Appellant appeared in Court with his counsel on July 11, 1966 for imposition of sentence, at which time the Court again informed the Appellant that the sentence to be imposed was a minimum of two years and a maximum of ten years and a fine not to exceed $20,000.00. The Court afforded Appellant's counsel and Appellant to make a statement in mitigation. Both Appellant's counsel and the Appellant expressed the desire, wish and hope to the Court that Appellant would receive medical treatment for his freely-admitted narcotic addiction. The Court sentenced the Appellant to the custody of the Attorney General for a period of ten years to become eligible for parole under Title 18, United States Code, Section 4208(2) at such time as the Board of Paroles may determine. The Court, in its commitment, recommended that the Appellant be taken to the federal institution at Lexington, Kentucky in order that his narcotic addiction may be arrested [TR I, 15-17].

The Appellant, following imposition of sentence, was initially incarcerated at Terminal Island, California and then removed to McNeil Island, Steilacoom, Washington. He He was received at Steilacoom on August 25, 1966 [TR I, 17].

The Appellant's petition to vacate the judgment of conviction was based on that he had not received medical treatment for his narcotic addiction; and, but for the fact of proffered treatment for his addiction, he would not have entered his plea to the Information as filed.

The Appellant was brought before the Honorable Roger D. Foley on June 30, 1967 to give testimony in support of his motion to vacate sentence. The Appellant testified that he had not received any treatment whatsoever for his narcotic addiction; that while incarcerated he has received vocational training in the electrical field; that at the time he entered his plea he was not aware that he would not, in fact, receive any treatment; that the sole inducing factor for his plea was the belief that he would receive treatment [TR II, 12-14][1]. It does not appear in the record that the trial court, at the time of imposition of sentence, informed the Appellant of its recommendation that he receive help for his addiction would be required to be followed or that the court's recommendation was any more than just that--a recommendation.

The trial court did inquire of Appellant's counsel what counsel had advised the Appellant. It appears from the

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1. TR II refers to the June 30, 1967 hearing

transcript that both Appellant and his family were advised that the Court had no control over the sentence, that medical treatment would have to come from the Bureau of Prisons, Washington, D.C. [TR II, 27-28]. The Court, after argument, took the petition under submission [TR II, 30].

The Court, in its formal Findings of Fact and Conclusions of Law, found that petitioner was correctly advised that the Court could not select a federal institution for his confinement but could only commit the Appellant to the custody of the Attorney General and recommend treatment; that the Appellant failed to prove by a propoundrance of evidence that his plea had been conditionally entered with the understanding that he would be committed to a United States Public Health Service Hospital [TR I, 18-19].

SPECIFICATIONS OF ERROR

The trial court erred in its finding that Appellant did not plea conditionally and with the understnnding that he would receive treatment and would be committed to a United States Public Health Service Hospital.

A R G U M E N T

When the Appellant appeared before the district court for his arraignment on June 13, 1966, prior to accepting his

plea, the Court, in compliance with Rule 11, F.R.Cr.P., made a determination that Appellant's plea was voluntary and that he understood the nature of the charge against him [TR I, 13].

The Appellant admitted selling C. D. Sherman thirty-two capsules of heroin not in the original stamped package. The Appellant was also advised by the Court that he could be subjected to a term of imprisonment of not more than two years nor more than ten years and with a possible fine of $20,000.00 and that it was within the judge's sole providence to determine what the sentence would be [TR I, 14-15]. The subject of hospitalization for the Appellant's narcotic addiction was not discussed. The trial court, at the June 30, 1967 Section 2255 hearing, commented that the subject was not touched upon [TR II, 21].

It is evident from the statement of the Appellant and the Appellant's counsel at the time of imposition of sentence that the motivating force for Appellant's plea was the belief that he would be sent to a hospital for treatment for his narcotic addiction [TR II, 15-17]. The trial court found and concluded that, after the June 30, 1967 hearing, Appellant failed to establish by a propoundrance of evidence that his plea was entered conditionally and with the understanding that he would forthwith be committed to a public

health service hospital [TR II, 19].

This Court has previously held that one's disappointment with a sentence imposed does not afford grounds for withdrawal of a plea of guilty. Pinedo v. USA, 347 F.2d 142 (9th Cir.1965), Kaldwell v. USA, 315 F.2d 667 (9th Cir. 1964). It is apparent from the record that the Appellant was disappointed with that aspect of his sentence, wherein he has failed to receive medical help for his addiction problem. Notwithstanding these decisions, it is believed that the trial court erred in refusing to grant Appellant's petition under Section 2255.

This Court, in Heiden v. USA, 353 F.2d 53 (9th Cir. 1955), entered an order of reversal when it appeared that Heiden had not intelligently entered his plea and waived his right to counsel at the time of arraignment. Any dispute as to an accused's understanding of his plea must be eliminated at the time of arraignment so that later the subjective state of the accused's mind is not an issue. Had the trial court ascertained at the time of Appellant's arraignment the condition upon which he entered his plea (belief that he would receive immediate medical treatment for his narcotic addiction), then the issues of fact that have now materialized would be non-existent and the Appellant

free from the prejudice that now exists.

C O N C L U S I O N

The trial court erred, and the Judgment, accordingly should be reversed.

Respectfully submitted

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RAYMOND E. SUTTON

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